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IN THE

Supreme Court of the United States

October TERM 1935

No. [redacted] 11

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUL,
Petitioners,

versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

SUPPLEMENTARY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MINITREE JONES FULTON,
HOMAN W. WALSH,
Counsel for Petitioners.

SUBJECT INDEX

SUPPLEMENTARY BRIEF IN SUPPORT OF PETITION

Argument 2

TABLE OF CASES CITED

Beal v. Essex, etc., Bank, 79 Fed. 816, 15 C.C.A. 128 11
Boat Harbor Ry. Company, Inc., 59 Fed. (2d) 366 4
Coffey v. U. S., 117 U. S. 233, 6 S. Ct. 717, 29 L. Ed. 890 2
Dwight v. Merritte, 4 Fed. 614 4
Early v. Richardson, 280 U. S. 496, 50 S. Ct. 176, 74 L. Ed. 575 10
Aetna Insurance Company v. Hallock, 6 Wall. 556, 18 L. Ed. 948 4
First National Bank of St. Louis v. State of Missouri, 44 S. Ct. 213, 263 U. S. 640 9
Markel v. Ray, 75 Minn. 138, 77 N. W. 788 at 790 10
Metropolitan Holding Co. v. Snyder, 79 Fed. (2d) Advance Sheets 263 12
Middleton Paper Company v. Rock River Paper Company, 19 Fed. 252 4
Ohio Bank v. Hullitt, 204 U. S. 162, 52 L. Ed. 423 10
O'Keefe v. Pearson, 75 Fed. (2d) 673 11
Pauley v. State, 17 S. Ct. 470, 165 U. S. 606 12
Richardson v. Shaw, 209 U. S. 265, 285 S. Ct. 512, 52 L. Ed. 835 11
U. S. v. Fifty Boxes, etc., Lace, 92 Fed. 601 5
U. S. v. Moore, 287 Fed. 879; 294 Fed. 852; 34 S. Ct. 331, 68 L. Ed. 860 4
U. S. v. Southern Dredging Company, 251 Fed. 400 5

TABLE OF STATUTES CITED

Revised Statute Section 911, Title 28, U.S.C.A., Section 721 6
Revised Statute U. S. Section 914 2
Title 12, U.S.C.A., Sections 63 and 64 (Judicial Code) 2

IN THE

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No. 828

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUL,
Petitioners,

versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

SUPPLEMENTARY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition for the Writ of Certiorari and supporting Brief were filed herein on March 14, 1935.

We respectfully ask leave of this Honorable Court to file this Supplemental Brief on behalf of petitioners on the following "Questions Involved and Presented" in the petition for the Writ of Certiorari:

First, under headings I, II, III, pages 6 and 7, and for the writ.

Second, under (2), (3), (4), and (7) of the Petition for the Writ at pages 9, 10, 11 and 12, and in the Supporting Brief under Argument I at pages 20 to 28, and IV and V at pages 32 to 46.

First: In addition to what is said in the petition and supporting brief it is respectfully urged that the District Court of the United States *was wholly without jurisdiction to maintain the proceeding by a Notice of Motion issued solely by respondent,* through his attorney, and to enter judgment thereon against petitioners under the Conformity Act, section 914, Revised Statutes of the United States,—since the cause of action sought to be asserted in the instant case was one brought in a Federal Court on a "new cause" of action arising solely under the laws of the United States to recover a double assessment levied in December, 1933, by the Comptroller of the Currency of the United States on certain shares of stock issued in 1930 by the First National Bank of Louisa, Virginia,—a purely Federal Statutory liability imposed solely under and by virtue of Title 12, U.S.C.A., sections 63 and 64, and since there was no "like cause" existing for such double assessment on shares of stock of insolvent national banks under the courts of the State of Virginia.

The holding of the Circuit Court of Appeals affirming the decision of the District Court, therefore, is in *conflict* with the decision of this court in *Coffey* v. *U. S.*, 117 U. S. 233, 6

S. Ct., 717, 29 L. Ed. 890 at 891, where passing directly on this question, it was held:

> "Section 914 prescribes a conformity to the practice in the court of the State only 'as near as may be,' and only 'in like causes.' 'Section 914 of the United States Revised Statutes (Comp. St. 1916, section 1537) *has no application to the case*, as it relates to conformity in practice and pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty, to the practice, pleading, and forms and modes or proceeding existing at the time '*in like cause*' in the courts of record of the State. *There is and can be no 'like causes' in the State Courts, for the action here is one within the exclusive jurisdiction of the Federal Court, and is a new and wholly statutory procedure.*"

So it is in the instant case, where the proceeding by Notice of Motion was wholly unauthorized by a rule of the U. S. District Court or the Conformity Act, section 914, *which expressly prescribed a conformity* to the practice in the courts of the State only "*as near as may be*," and *only* "*in like causes*," and there can be no "like causes" in the State Court, for the action here is a new cause created by the Federal Statute, Title 12, U.S.C.A., sections 63 and 64, and is one within the exclusive jurisdiction of the Federal Court, and section 911, Revised Statutes of the United States, required that the suit should be begun in the District Court of the United States "by a writ or process" issued from the Court under the seal of the Court signed by the clerk, and to bear the teste of the District Judge, "and is not authorized to be begun or issued by respondent by his counsel," and that section has not been followed in the instant case, and the United States District Court is without jurisdiction to entertain the

proceeding. *Dwight* v. *Merritt*, 4 Fed. 614. *Etna Insurance Company* v. *Hallock* (*Etna Insurance Company* v. *Doe*), 6 Wallace 556, 18 L. Ed. 948; *Middleton Paper Company* v. *Rock River Paper Company*, 19 Fed. 252.

In the reecnt case of *United States, to use, etc.*, v. *Boat Harbor Marine Ry. Company, Inc., et al.* (D. Ct. E. D. of Virginia), 58 Fed. (2d) 366, the Court there held "that the Conformity Act applied to all civil causes, other than equity and admiralty causes, which would include *all proceedings at law in the District Court, except for the fact that the latter part of the act limits the recommendation to Conformity to the practice, pleadings and forms, and modes of procedings in "like causes" in the courts of record in the State,"* and said:

> "It has been held, *and it would seem proper*, that a cause of action *arising under a Federal Statute over which the Federal Courts are given jurisdiction*, as they are in cases like the instant one, *is not a 'like cause' in a Federal Court within the meaning of the Conformity Act."*

In *U. S.* v. *Moore* (D. C. E. D. N. Y. 1923), 287 Fed. 879, the Court at page 882 said:

> "There it would seem that by the use of the words 'like causes' it was intended *to eliminate proceedings in bankruptcy of which the State Courts have no jurisdiction*, and, therefore, *there could be no practice or procedure in the State Courts in 'like causes' to which the Federal Courts could conform."*

This case was appealed to the Circuit Court of Appeals and affirmed, 294 Fed. 852, and a Writ of Certiorari was denied by this Court, 34, S. Ct. 331, 68 L. Ed. 860.

In *U. S.* v. *Fifty Boxes, etc., Lace* (D. C. N. Y.), 92 Fed. 601, the Court, then held that the Conformity Act *did not apply* to the manner of executing commissions for taking depositions in revenue cases and cited *U. S.* v. *Coffey, supra,* as authority for that holding.

In the *U. S.* v. *Southern Dredging Company* (D. C., Del.), 251 Fed. 400, the Court there held that where the Federal Statutes provided that a surety company should appoint a statutory agent to accept service of process, and service was left at the statutory agent's house in the presence of his wife:

> "There is and *can be no 'like causes'* in the State Courts, for the action here is one within the *exclusive jurisdiction of the Federal Court, and is a new and a wholly statutory procedure.*"

This is clearly true in the instant case. The action sought to be asserted by the Notice of Motion is a new and an exclusive statutory Federal "cause of action" to recover for an assessment levied in 1934 by the Comptroller of the United States on the shares of stock of an insolvent national bank, of which the Federal Court had exclusive jurisdiction under Title 12, U.S.C.A., sections 63 and 64, providing for such a double assessment, and which "cause" of action was wholly unknown to the common law, and to the State practice, pleading, and forms, and modes of proceeding in the Virginia Court. There was and could be no "like cause" therefore, in the courts of record in that State; and the instant case is not a "like cause" within the meaning of the Conformity Act, as defined in the authorities cited *supra*, and the proceeding had to be under section 911 of the Revised Statutes of the United States.

The District Court of the United States was, therefore, clearly without jurisdiction to maintain the proceeding by

a Notice of Motion which *was begun and issued solely* by the respondent by his attorneys, and was not under the seal of the District Court, signed by the Clerk, and did not bear the teste of the District Judge, as was required by section 911 of the Revised Statutes of the U. S.

The Circuit Court of Appeals in its decision (Op. R. 72), therefore, in affirming the judgment of the District Court, has, therefore, rendered a decision against petitioners in conflict with the decisions of this Court and with the applicable decisions of other Circuit Courts of Appeal of the United States, and has misconstrued and misapplied Title 12, U. S. C. A., sections 63 and 64 and sections 911 and 914 of the Revised Statutes of the United States.

The proceeding in the instant case by Notice of Motion issued by and signed by respondent by his counsel to begin a cause of action arising under the Federal Statutes, Title 12, U.S.C.A., sections 63 and 64, over which the Federal Courts are given exclusive jurisdiction, is not a "like cause of action" within the meaning of the Conformity Act, or by State statutes as to proceedings by Notice of Motion thereon.

Second: Supplementing what has been said in the petition for the writ, under (2), (3), (4) and (7) at pages 9, and 10, and 11, and 12, and in the Supporting Brief under Argument I at pages 20-28, and IV and V at pages 32 and 46; it is respectfully urged that the Circuit Court of Appeals of the Fourth Circuit, in affirming the judgment of the District Court for $22,000 interest jointly and severally against petitioners in 1935, for payment of the entire double assessment on the whole 220 shares of stock, was erroneous, and was based upon wholly extraneous, irrelevant and collateral evidence admitted over the objections and exceptions of Petitioners and other defendants (R. 32-34, 39, 41, 44, 24, 27-28).

This evidence (R. 27-28, 4 to 9) related:

First, to the note given by petitioners and other defendants to the American Bank and Trust Company of Richmond, Virginia, to borrow money, by each of them to pay for his one-eleventh part of the stock previously purchased in 1930 by each of them from the Bank of Louisa (R. 34-35, 39, 42-43, 46, 47, 51-56);

Second, That in 1930 the eleven defendants below severally had on deposit in the Bank of Louisa sundry amounts;

Third, That one of them was then overdrawn in such bank;

Fourth, That some of them were borrowers and had both a direct and indirect liability to such bank;

Fifth, That there were two rival banks in the town of Louisa;

Sixth, That the First National Bank of Louisa had been paying 4% on earnings and had been trying to reduce it to 3%; and

Seventh, That Chisholm in 1935 had brought suit for contribution from the other co-makers of the above note given by them in 1930 to the American Bank and Trust Company (R. 27-28).

It is urged, first, that all of this testimony was extraneous and irrelevant, and, second, that even if relevant, it did not in any way *change the contract whereby each of the petitioners and other defendants had only* "purchased one-eleventh" of the 220 shares of stock for himself from the Bank of Louisa. Supporting Brief, p. 18 (3).

The District Court during the trial (R. 34) and in its opinion (R. 61) found from the evidence (R. 34-35, 37, 39, 40, 43, 46, 47, 48, 50, 51, 53, 54, 55, 56), that each of the petitioners "merely had an undivided one-eleventh interest in the entire block" of 220 shares, and (R. 34) *that the contract of purchase was one contract and that the contract made with the American Bank and Trust Company* to borrow the money to pay for the stock, *was another and separate contract* made between different parties. On this point, the District Court (R. 34) said:

> "The Court: The stock was subscribed for, that is one agreement between the people. That they went down and made a joint promissory note for a certain amount, that is another agreement. A joint judgment was rendered against them," referring to the note given the American Bank and Trust Company.

But, even if the above extraneous evidence should be deemed to be relevant, *then it was so far in conflict with the positive testimony of the petitioners and other defendants, to the effect that each of them had only purchased one-eleventh thereof,* that it necessarily rendered the decision of that question, of *disputed* fact, one to be decided by the jury, and not one to be decided as a matter of law by the court of the motion of respondent for a directed verdict in its favor (R. 63).

Moreover, the Circuit Court of Appeals while finding from the evidence that "each had a one-eleventh interest in the enterprise," it, nevertheless, erroneously held that each of them was responsible for the payment of the entire assessment made by the Comptroller of the Currency on the whole 220 shares of stock (Supplementary Brief, 28-31).

The cases cited in the Court's Opinion did not involve the individual responsibility of shareholders under Title 12, U.S. C.A., sections 63 and 64, for the payment of double assessments made by the Comptroller of the Currency on the shares of insolvent national banks. They are, therefore, not in point or controlling in the instant case, since the responsibility for the payment of the double assessment is purely individual, and several and statutory (Title 12, U.S.C.A., sections 63 and 64) and decisions cited in the Supporting Brief at pages 42-44.

It is thus obvious that the Circuit Court of Appeals failed to consider the Federal Statutes in connection with the fact that the contract made by petitioners and other defendants was to purchase *only* "one-eleventh" of the 220 shares of stock in the block (R. 74), has found by both (R. 61), and likewise failed to consider section 5220 of the Revised Statutes of the United States which defines the liability of the shareholders provided for by section 5151, U.S.R.S., to an "individual liability," and says it "may be enforced" by the receiver of any insolvent national bank.

The authority of the receiver of such insolvent national bank is likewise purely statutory, *and is limited to the powers expressly granted or necessarily implied from the language of the above statutes. First National Bank of St. Louis* v. *State of Missouri, etc.*, 44 S. Ct. R. 213 at 125, 216, 263 U. S. 640 at 659, where this Court said:

> "Moreover, the reasons adduced against the existence of the power *substantively* are conclusive against its existence *incidentally;* for it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. Certainly, an incidental power can avail neither

to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted.

It is therefore respectfully urged that the decision of the Circuit Court of Appeals is in conflict with the above case, and is also in conflict with the decision of this Court in the recent case of *Early* v. *Richardson*, 280 U. S. 496 at 499, 50 S. Ct. 176 at 177, 74 L. Ed. 575, where it was held:

> "That the actual owner *may be held liable for the assessment*, although his name does not appear on the transfer books of the bank, is well settled."

Also in *Ohio Bank* v. *Hulitt*, 204 U. S. 162 at 168, 52 L. Ed. 423 at 427; and *Wells* v. *Larrabee*, 36 Fed. 866, where the Court there held:

> "There is no principle of law or equity which justifies the holding of *a person liable as a stockholder in a corporation, if in fact he is not one*, unless he has knowingly permitted his name to appear as a stockholder and thereby misled parties dealing with the corporation."

In *Markel* v. *Ray*, 75 Minn. 138, 77 N. W. 788 at 790, the Court said:

> "It did not appear that James D. and Robert C. were partners and nothing of the kind appeared in the books of the corporation. Under these circumstances, they appeared to be tenants in common, each appearing to be a holder of an undivided half interest in the stock; and we are of the opinion that Robert C. should not be held liable for more than one-half of the face value of the stock and the devisees for the other half."

These cases clearly establish that the owner of shares of stock in a national bank is *"individually responsible"* for the double assessment made only on the shares severally owned by him, and that the assessment in the instant case is limited to his actual beneficial ownership of each stockholder to his one-eleventh of the 220 shares (R. 35, 39, 32, 43, 46, 47, 49, 53, 54, 56).

The decision of the Circuit Court of Appeals is also in conflict with the following decisions:

In *O'Keefe* v. *Pearson,* 75 Fed. (2d) 673 at 677, it was contended that the stock was transferred to secure *unity of control through voting power,* and it was held that each depositor of the stock was liable *only* to the extent of the stock held for him though it was part of one large certificate. The Court said:

> *"But such contention is of no avail,* for it appears that all the shares of stock in the hands of the depositary were shares *of the Federal National Bank,* each share of which was of the face value of $20, and, such being the case, *it can make no difference on the question of ownership that no specific shares of bank stock were set apart for the defendant to answer to his trust certificates."*

To same effect *Richardson* v. *Shaw,* 209 U. S. 265 at 387 at 379, 28 S. Ct. 512, 52 L. Ed. 835.

In *Beal* v. *Essex, etc., Bank,* 67 Fed. 816, 15 C.C.A. 128 at 129-130, the Court said:

> "We are all of the opinion that in the proper sense of the word 'shareholders' one does not become such *by*

merely making a loan on the security of the stock, no matter what formalities the transaction takes. . . . This view of the word 'shareholders' is strengthened by the expression contained in the early part of section 5151, namely, the words, 'in addition to the amount invested in such shares'."

So that petitioners by making a loan from the American Bank and Trust Company on the security of the shares of stock which each had bought from the First National Bank of Louisa *did not change this contract of purchase by each of one-eleventh*, and did not make each of them liable jointly or severally for payment of the *whole* double assessment thereafter made on the entire 220 shares. The holding in above last cited case was affirmed in *Pauly* v. *State, supra,* 17 S. Ct. at page 470, where this Court held:

"That *the real owners* of the shares of capital stock of the National Bank Association may in every case be termed as Shareholders within the meaning of section 5151" (Now Title 12, section 63).

It is also in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Metropolitan Holding Co.* v. *Snyder* (November 11, 1935), 79 Fed. (2d), Advance Sheets, 263 at 265, where the Court (Stone and Sanborne, Circuit Judges, and Ragon, District Judge), held:

"The question to be determined is whether, under the plan *adopted* by the *individual appellants* to restore the impaired capital of the bank, *they became the beneficial owners of the stock*, and the holding company a mere agency in carrying out the transaction, or whether the holding company became the actual owner and the relation of the individual appellants to the plan was solely that of stockholders in the holding company,"

and at page 266 the Court, passing on this question, said:

> "The objects of the statute are not to be defeated by mere forms of the transaction. *The courts will look at the relations of parties as they actually are,* or as, by reason of their conduct, they must be assumed to be, for the protection of creditors. Congress did not say that those only should be regarded as shareholders, liable for contracts, debts, and engagements of the banking association, *whose names appear on the stock list* distinctly as shareholders. *Those may be treated as shareholders* of the association within the meaning of section 5151 *who are in fact the real owners of the stock.* *Pauly* v. *State Loan & Trust Co.,* 165 U. S. 606-623, 17 S. Ct. 465, 471, 41 L. Ed. 844."

The Circuit Court of Appeals in holding that each of the petitioners was liable for the payment of the entire double assessment on the whole 220 shares of stock, also erroneously overlooked the fact that the evidence showed that each only purchased one-eleventh, agreed to contribute a definite portion of the purchase price, and to take one-eleventh of the total number of shares. Therefore, even if this made them joint owners of the 220 shares, it, nevertheless, did not establish between them the relation of "joint adventurers" or make each liable for the whole double assessment. *"Bomaster* v. *Carrol,* 23 Fed. (2d), 825 at 827.

It is therefore respectfully urged that the decision of the Circuit Court of Appeals in the instant case involved a Federal question and misconstrued and misinterpreted and misapplied Title 12, U.S.C., sections 63 and 64, and sections 921 and 914 of the Revised Statutes of the United States, and that its decision was in conflict with the applicable decisions

of this and other Federal Courts, and with the weight of the evidence, as well as of the authorities, and that the Writ of Certiorari should be granted.

Respectfully submitted,

MINITREE JONES FULTON,
HOMAN W. WALSH,
Counsel for Petitioners.

April 2, 1936.

INDEX

	PAGE
Opinions Below	1
Questions Presented	2
Statement	2
Specifications of Error to Be Urged	5
Argument	6
Appendix	20